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No. 83-558

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

IRVING INDEPENDENT SCHOOL DISTRICT,
Petitioner,

v.

HENRI AND MARY TATRO, INDIVIDUALLY AND AS NEXT FRIEND OF AMBER TATRO, A MINOR
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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REPLY BRIEF FOR PETITIONER

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STATEMENT OF THE CASE

The effort to raise additional questions for review, and the *Statement of the Case* tendered by Respondents, require the Petitioner to reply and to clarify the factual and legal issues before the Court. The following is intended to supplement the Petitioner's Statement of the Case and to correct the inaccuracies and/or omissions contained in Respondents' Statement of the Case.

1. Amber Tatro was, at all times relevant to these proceedings, entitled to special education *solely* because she was *orthopedically* impaired. This was so stipulated by the parties, and Respondents have never contended to the contrary. (J.A. 8a) The requested *medical treatment* of "Clean Intermittent Catheterization" is not, in any

way, related to the care or treatment of her orthopedic handicap. (J.A. 9a, 11a, 12a) (Dft. Ex. 7; Vol. 3, p. 393).

2. Respondent has never contended the requested medical treatment was a "supplementary aid or service." (J.A. 6a, 14a) Education of Amber in the *least restrictive environment* has never been at issue since the Petitioner's Early Childhood Development classes were only for pre-kindergarten, eligible handicapped students. ("Pet. Brief") at 3. The issue of educating Amber with children who were not handicapped has thus never been in question since the Petitioner did not offer education to *non-handicapped*, pre-kindergarten students. (R. Vol. 4, p. 318) (Pl. Ex. 5a, b, c; R. Vol. 3, p. 137).

3. The simplicity or complexity of the requested *medical treatment*, and what it involves, is determined by referring to the Pre-Trial Order, Stipulated Facts (J.A. 9a, 10a) (Pet. App. 1a), and "Current Approaches to Urologic Evaluation and Management of Infants and Children with Myelodysplasia." (Dft. Ex. 7; R. Vol. 3, p. 393).

4. It was stipulated by the parties "Clean Intermittent Catheterization" was *medical treatment* (J.A. 12a), and that prescribing such *medical treatment* is a medical function and the sole responsibility of the treating physician. (J.A. 12a) To provide the requested *medical treatment* without a valid medical prescription would constitute the unlawful practice of medicine. (Pet. App. 12a) Respondents have not previously contested such finding, nor perfected any appeal therefrom.

5. Respondents *now* contend the Petitioner's policy concerning the dispensing of oral medication and administering emergency injections forms the basis for discrimination. ("Resp. Brief") at 23 and 41. Pl. Ex. 2 (Tr. 38). Respondents have not contended the benefits of such

policy have been denied Amber or any handicapped child. The policy was enacted by the Petitioner pursuant to legislative authority, TEX.EDUC.CODE § 21.914, in order that its employees be immune from civil liability for damages if they give a student prescribed oral medication. (R. Vol. 2, pps. 357, 372, 373) Respondents do not contend there is similar legislative authority and immunity from civil liability if the Petitioner's employees administer, or fail to administer, the requested *medical treatment* at issue in the case at bar.

ARGUMENT

Respondents' brief seems basically designed to ignore the pertinent, relevant facts on which the decision of the Court below was based, most of which they agreed to. They want to ignore that "Clean Intermittent Catheterization" is *medical treatment*, that Petitioner could not lawfully provide it, and that prescribing such *medical treatment* is the sole responsibility of the treating physician and is purely a *medical* (as opposed to an *educational*) function. (J.A. 12a) (Pet. App. 12a) Having done so, the Respondents want this Court to also ignore the pertinent, relevant facts, and analyze, emotionally, a most complex and delphic act of Congress in order to reach a desired result.

Perhaps the District Court best described the difficult role this Court must play when it described its own:

> "Amber's plight tugs at the heartstrings, and given the relative rarity of spina bifida, there is a temptation to here achieve a 'humane' result. Despite the limited number of times school boards may be faced with a child requiring CIC, the interpretation of these federal statutes has wide consequences because it involves definitions of the duty of hundreds of school districts to be discharged in myriad factual

> patterns. The limits on this court's institutional role here gives little play for this court's humanitarian concern for Amber and her parents. This court instead is called on to engage in the relatively emotionally barren task of providing the interstitial stuffing to acts of Congress against a background of its intent and purpose in enactment." (Pet. App. 87a)

As we now discuss, as unemotionally as we can, Respondents' brief addresses the central issues only indirectly.

1. Denial Of Clean Intermittent Catheterization Does Not Result In Excluding Amber From The Public Schools, Nor Deny Her The Benefits Of A Free Appropriate Public Education.

Amber is entitled to, and the Petitioner is obligated to provide, a "free appropriate public education" defined at 20 U.S.C. § 1401(18) to mean:

> ". . . special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate pre-school, elementary, or secondary school education in the state involved; and (D) are provided in conformity with the individualized education program required under Section 1414(a)(5) of this title."

An "individualized education program" is defined at 20 U.S.C. § 1401(19) to mean:

> ". . . a written statement for each handicapped child developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, *specially designed instruction* to meet the unique needs of handicapped children, the teacher, the parent or guardian of such child, and, whenever appropriate, such child, *which state-*

ment shall include (A) a statement of the present levels of educational performance of such child; (B) a statement of annual goals, including short-term instructional objectives; (C) a statement of the specific *educational* services to be provided to such child, and *the extent to which such child will be able to participate in regular educational programs;* (D) the projected date for initiation and anticipated duration of such services; and (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved." (Emphasis added.)

Section 1414(a)(5), referred to in the definition of "free appropriate public education," requires the local educational agency to "provide assurances that the local educational agency or intermediate educational unit will establish, or revise, whichever is appropriate, an "individualized education program" for each handicapped child at the beginning of each school year, and will then review and, if appropriate, revise its provisions periodically, but not less than annually."

In order to qualify for assistance under 20 U.S.C. § 1400 et seq., the State must satisfy the Commissioner that it has established procedures to assure that, to the maximum extent *appropriate*, handicapped children are educated with children who are not handicapped, and that other removal of handicapped children from the regular educational environment occurs only when the *nature or severity* of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 20 U.S.C. § 1412(5).

A local educational agency which desires to receive payments under 20 U.S.C. § 1411(d) submits an application to the State educational agency, which shall provide satisfactory assurance payments under the statute will be

used for excess costs directly attributable to programs which:

> "(C) establish a goal of providing full educational opportunities to all handicapped children, including:
>
> (iv) to the maximum extent *practicable* and consistent with the provisions of Section 1412(5)(B) of this title, the provision of special services to enable such children to participate in regular educational programs;" 20 U.S.C. § 1414(a)(1)(C)(iv). (Emphasis added.)

The regulations implementing 20 U.S.C. § 1400 et seq. concerning "placements" and "least restrictive environment" require each State educational agency to insure that each public agency establishes and implements procedures which meet the following requirements, 34 C.F.R. § 300.550:

> Handicapped children are educated with children who are not handicapped to the maximum extent *appropriate*, and removal of handicapped children from the regular educational environment occurs only when the *nature* or *severity* of the handicap, with the use of *supplementary* aids and *services*, cannot be achieved satisfactorily. 34 C.F.R. § 300.550(b)(1), (2).
>
> The public agency must make available a continuum of alternative placements, and make provision for *supplementary services in conjunction with* regular class placement, such as resource room or *itinerant instruction*. 34 C.F.R. § 300.551(a) and (b)(2).
>
> Each handicapped child's educational placement must be determined at least annually, based on their *individualized education program*, and have to them available the continuum of alternative placements to the extent necessary to implement the *individualized education program*. In selecting the least restrictive environment, each public agency

> shall insure that *consideration is given to any potential harmful effect* on the child or on the quality of services which they need. 34 C.F.R. § 300.552.

Respondents would have us believe that without the *medical treatment* prescribed by Amber's doctor being furnished to her at public expense with no cost to her parents, Amber will be completely excluded from public education and be denied the benefits of "specialized instruction" to meet her unique needs. ("Resp. Brief") at 9. Respondents' brief would lead Amber and Petitioner's school teachers to believe they have only three options if Amber is not furnished the *medical treatment* by Petitioner; (1) Amber's parents must provide or pay for the *medical treatment*, (2) Amber must be placed in a special school for handicapped children, or (3) Amber must be kept at home, ("Resp. Brief") at 10, 12, and 13. Such a limiting analysis of the educational opportunities available to Amber disregards the foregoing statutory and regulatory provisions, their legislative history, and this Court's decision in *Board of Education* v. *Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982).

Petitioner recognizes Amber is entitled to be educated with non-handicapped children to the maximum extent *appropriate* for *her*. It also recognizes that Amber, and other children similarly situated, cannot be placed in, what might otherwise be, the "least restrictive environment" without considering the *potential harmful effect* such a placement would have on Amber. *Board of Education* v. *Rowley*, *supra*, at 3038, n.4; 34 C.F.R. § 300.552. For this reason, Petitioner must provide Amber a continuum of alternative placements for her specialized instruction, and make provision for providing her *supplementary* services (such as itinerant instruction) in conjunction with regular class placement. 34 C.F.R. § 300.551.

Amber is receiving the *medical treatment* prescribed by her doctor pursuant to the orders of the District Court. Should this Court agree with Petitioner that 20 U.S.C. § 1400 et seq. does not require Petitioner furnish *medical treatment* prescribed by a private physician, Amber and other handicapped children will *not* automatically be excluded and segregated from public schools or from non-handicapped children as Respondents' brief so direly predicts.

Amber's "individualized education program" may require revision. Complying with the procedural safeguards of 20 U.S.C. § 1415, 34 C.F.R., Part 300, Subpart E, and the State Plan in revising such program should assure Amber the content of her "individualized education program" will provide her the basic floor of educational opportunity envisioned by Congress, and be reasonably calculated to enable her to receive a free appropriate public education in "the least restrictive environment." *Board of Education* v. *Rowley, supra,* at 3050, 3051.

As the Court noted in *Rowley, supra,* at 3052, entrusting Amber's education to this process does not leave her without protection. By providing for parental involvement in the development and formulation of Amber's "individual educational program," Amber is assured she is protected and appropriate educational services are provided her. "As this very case demonstrates, parents and guardians will not lack ardor in seeking to ensure that handicapped children receive all of the benefits to which they are entitled by the Act." *Board of Education* v. *Rowley, supra,* at 3052.

2. Reasonable Accommodation Of The Handicapped And Section 504 Of The Rehabilitation Act.

Respondents' brief would attempt to lead to a conclusion Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, creates some obligation and rights independent of 20 U.S.C. § 1400 et seq. Such an analysis and conclusion disregards, and is contrary to, the statutes and its implementing regulations. Further, it is not supported by the record.

Section 504 prohibits discrimination against an otherwise qualified individual, solely by reason of their handicap, under any program or activity receiving Federal financial assistance. 29 U.S.C. § 794. Regulations implementing Section 504 provide that the development and implementation by a recipient of an "individualized education program" in accordance with 20 U.S.C. § 1400 et seq. satisfies the requirement to provide a qualified handicapped person a free appropriate public education.

Compliance with 20 U.S.C. § 1400 et seq. satisfies Section 504. If 20 U.S.C. § 1401(18) and (19) does not require Petitioner provide medical treatment to its handicapped students, Section 504 cannot require it.

Conversely, Section 504 may not require "substantial adjustments in existing programs . . .", *Southeastern Community College* v. *Davis*, 442 U.S. 397, 411; 99 S.Ct. 2361, 2369 (1979), nor require the provision of services that would impose "undue financial and administrative burdens" upon the recipient. *Southeastern Community College* v. *Davis*, *supra*, 99 S.Ct. at 2370. "Thus, for example, Section 504 may not require the school district to provide a very expensive procedure like kidney dialysis to a child who needs such a service during the school day." *Tatro* v. *Texas*, 625 F.2d 557 (1980) ("Tatro I"). (Pet. App. 108a) Such *medical treatment*, however, could

be required under 20 U.S.C. § 1401(18) if it is prescribed by the handicapped child's doctor and delegated to the school district, regardless of the cost, adjustments, or burdens.

The same result is reached if the handicapped child's doctor chooses to prescribe "Sterile Catheterization" rather than "Clean Intermittent Catheterization." ("Resp. Brief") at 3. Either the public school does what the doctor prescribes, or it challenges the doctor's prescription as not complying with the "standard of medical practice" believed to be the most current at the time. If the Education of All Handicapped Children Act requires *medical treatment* be provided, whether Section 504 requires it or not is a moot issue.

Resolving the central issue in this case is thus not aided by determining whether or not providing *medical treatment* is a "reasonable accommodation" to enable a handicapped child to benefit from any program or activity receiving Federal financial assistance. The issue can only be resolved by determining whether or not Congress requires the public schools to provide the *medical treatment* prescribed by a private physician under the provisions of 20 U.S.C. § 1400 et seq.

Respondent's brief at 41 also contends Petitioner has discriminated against Amber under classical discrimination analysis. Although there are no findings or evidence to support such contentions, a brief reply should lay the matter to rest.

The policy of Petitioner concerning the dispensing of oral medications was adopted pursuant to specific legislative authorization (Pl. Ex. 2), V.T.C.A., Education Code § 21.914. The statute is set forth in its entirety as an appendix to this brief.

Both the statute and the subject policy, on their face, treat the handicapped student and the non-handicapped student the same. The record is void of evidence or findings to the contrary.

CONCLUSION

To paraphrase Justice BLACKMUN, perhaps the parties and the courts below have focused too narrowly on the presence or absence of a particular service rather than on the total package of services furnished to Amber by the School Board. *Board of Education* v. *Rowley*, *supra*, at 3053.

For the reasons stated here and in Petitioner's opening brief, the judgment below should be reversed.

Respectfully submitted,

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APPENDIX

VER. TEX. CODE ANN. (Vernon Supp. 1984) Education Code

§ 21.914 ADMINISTERING OF MEDICATION BY SCHOOL DISTRICT EMPLOYEES: IMMUNITY FROM LIABILITY

(a) As used in this section, "employees" means superintendents, principals, classroom teachers, supervisors, counselors, registered nurses, teachers aides, secretaries, or any other classified person employed by a school district.

(b) The board of trustees of each school district shall adopt policies concerning the administering of medication to students by employees of the district.

(c) On the adoption of policies as provided in Subsection (b) of this section, the school district, its board of trustees, and its employees shall have immunity from civil liability from damages or injuries resulting from the administering of medication to a student, if:

(1) the school district has received a written request to administer the medication from the parent, legal guardian, or other person having legal control of the student; and

(2) when administering prescription medication, the medication appears to be in the original container and to be properly labeled.

(d) Nothing herein shall be construed to grant immunity from civil liability for injuries resulting from gross negligence.

Added by Acts 1977, 65th Leg., p. 1268, ch. 491, § 1, eff. June 15, 1977. Amended by Acts 1979, 66th Leg., p. 1072, ch. 502, § 1, eff. June 7, 1979.